

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CAPITOL RECORDS, LLC, a Delaware limited liability company; CAROLINE RECORDS, INC., a New York Corporation; VIRGIN RECORDS AMERICA, INC., a California Corporation,

Plaintiffs,

v.

VIMEO, LLC d/b/a VIMEO.COM, a Delaware Limited Liability Company; CONNECTED VENTURES, LLC, a Delaware Limited Liability Company, and DOES 1-20, inclusive,

Defendants.

EMI BLACKWOOD MUSIC, INC., a Connecticut Corporation; EMI APRIL MUSIC, INC., a Connecticut Corporation; EMI VIRGIN MUSIC, INC., a New York Corporation; COLGEMS-EMI MUSIC, INC., a Delaware Corporation; EMI VIRGIN SONGS, INC., a New York Corporation; EMI GOLD HORIZON MUSIC CORP., a New York Corporation; EMI U CATALOG, INC., a New York Corporation; EMI UNART CATALOG INC., a New York Corporation; JOBETE MUSIC CO., INC., a Michigan Corporation; and STONE DIAMOND MUSIC CORPORATION, a Michigan Corporation,

Plaintiffs,

v.

VIMEO, LLC d/b/a VIMEO.COM, a Delaware Limited Liability Company; CONNECTED VENTURES, LLC, a Delaware Limited Liability Company, and DOES 1-20, inclusive,

Defendants.

CASE NOS. 09 CV 10101 (RA)
09 CV 10105 (RA)

**SUPPLEMENTAL DECLARATION OF
JAMES D. BERKLEY (1) IN SUPPORT OF
PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT, AND (2) IN
OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

I, James Berkley, the undersigned, hereby declare as follows.

1. I am employed as a Senior Research Analyst at Mitchell Silberberg & Knupp LLP, counsel for Plaintiffs in this action. As set forth in my original declaration in support of Plaintiffs' Motion for Partial Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment, I have been tasked since August 2009 with investigation of the website available at www.vimeo.com (the "Vimeo Website") and with the preservation of certain evidence concerning the Vimeo Website and pertaining to Plaintiffs' claims in this action. Additionally, I have reviewed and am familiar with the documents produced by Defendants in this action and with the declarations submitted by Defendants with respect to the present motions. I have personal knowledge of all of the following facts and, if called as a witness, could and would testify competently thereto.

2. Attached hereto as **Exhibit 1** is a true and correct copy of a chart prepared by me regarding Plaintiffs' works and corresponding videos referenced in the original schedules attached to Plaintiffs' Complaints. This chart summarizes certain information found in Paragraph 8 and Exhibits 17 through 21 of the Declaration of Russell J. Frackman submitted on October 12, 2012, and in Paragraphs 35 through 40 and Exhibits 34 and 36 of my previous declaration, as well as information referenced in Plaintiffs' Statement of Undisputed Facts.

3. Attached hereto as **Exhibit 2** is a DVD-ROM prepared at my direction containing true and correct copies of certain videos referenced in Plaintiffs' Motion for Partial Summary Judgment, which were downloaded by me or at my direction from the Vimeo Website in connection with this litigation. When the DVD is inserted on a properly configured Windows-based computer, a main menu for the videos can be opened by clicking the file labeled "start.exe." As can be seen in the menu, the videos are divided into three groups generally listed

alphabetically. However, the first group – which includes videos among the 55 referenced in Plaintiffs' concurrently filed reply – begins with ten videos identified in Plaintiff's original schedules that were uploaded and maintained by employees of Defendants.

4. In addition to other information, Exhibit 1 referenced above contains a column labeled "Pre-Nov. 2008." This column indicates those videos referenced in Plaintiffs' original schedules that I determined to be uploaded to the Vimeo Website prior to November 2008, which is the month that Defendants assert that Vimeo's "Purgatory" database was implemented. *See, e.g.*, Suppl. Decl. of Michael Cheah, ¶ 9. I populated this column by determining that videos on the Vimeo Website bearing ID numbers 2090488 and below were posted no later than October 28, 2008. For example, attached hereto as **Exhibit 3** are true and correct screenshots obtained on or about December 19, 2012 from archived web pages of the Vimeo Website, found respectively at the Uniform Resource Locators ("URLs")

<http://web.archive.org/web/20090203224222/http://vimeo.com/202585> and

<http://web.archive.org/web/20090216160809/http://vimeo.com/2090488>, each superimposed with excerpts from their source code showing the respective upload dates of these videos from Plaintiffs' Schedules to be July 1, 2007 and October 28, 2008. Although it is my understanding that Vimeo tracks the date of upload for all videos, Vimeo did not produce this information to Plaintiffs when it produced other information from its database.

5. In my original declaration, I provided examples cited in Plaintiffs' Statement of Undisputed Facts (¶ 313) regarding Vimeo users who received "form" e-mails responding to queries concerning music use, and who nonetheless uploaded and maintained videos infringing Plaintiffs' works. Two of these same examples have been supplied as "sample" correspondence between Vimeo and its users in Exhibit 1 to the Supplemental Declaration of Michael Cheah (at

pages 13 and 60 therein, bearing Bates numbers VCV005713 and VCV023508 respectively).

For the convenience of the court, attached hereto as **Exhibit 4** are true and correct copies of these two e-mails, followed by true and correct copies of Exhibits 48 and 49 to my original declaration showing examples of such videos.

6. Exhibit 2 to the Supplemental Declaration of Michael Cheah is purported to contain copies of certain forum postings referenced in Paragraph 3 of his declaration. I have reviewed these various postings, and have determined that the forum posts referenced in the text of the declaration do not match those included in the exhibit, and that the earliest posting included or referenced in either place is from 2009, the year Plaintiffs filed their Complaints.

7. The first page of Exhibit 3 to the Supplemental Declaration of Michael Cheah consists of an e-mail produced by Vimeo as VCV004144 from a user named Jamon Van Den Hoek, regarding a video removed from the URL <http://vimeo.com/4111440> (i.e., video ID number 4111440). Based on my review, this is the only actual video referenced in this exhibit that was purportedly removed by Vimeo specifically because it used either infringing sound recordings or musical compositions. (Another e-mail refers to removal of “audio-only videos,” but they are not truly videos.) However, according to Vimeo’s Purgatory database as produced by Defendants, the video referred to in VCV004144 was not removed from the Vimeo Website “of Vimeo’s own accord” but instead “as a result of a third-party notification by Future Primitive claiming that this material is infringing.” Attached hereto as **Exhibit 5** is a true and correct excerpt from Vimeo’s produced “Purgatory” database prepared by me concerning this video,

followed by a true and correct copy from the current Vimeo web page at this URL bearing the same statement, which I accessed and caused to be printed on or about December 20, 2012.¹

8. On dates between on or about November 30, 2012 and December 20, 2012, I conducted research to determine if the six accounts referenced in Paragraph 10 to the Supplemental Declaration of Michael Cheah had been terminated, and if so, their approximate date of termination. It is my understanding that the first five accounts listed in this Exhibit 10 (i.e., 278039, 431377, 538358, 552652, 1457856) were referenced in the January 2011 expert report of Professor Ellis Horowitz (and, with one exception, in Mr. Cheah's November 2010 deposition) as pertaining to users who at that time were still active on the Vimeo Website despite three or more "strikes" reflected in Vimeo's Purgatory database.

9. Attached hereto as **Exhibit 6** are records from Vimeo's produced Purgatory Database reflecting the users referenced in the prior paragraph, indicating their respective user names to be "ddeubel," "John Bach," "Jake Collins," "bob jackson," and "S.I.R. Remixes."

10. By researching the accounts of the five above-referenced users via the Internet "Wayback Machine" at www.archive.org, I was able to conclude that, according to information available on the Vimeo Website, these accounts and their associated videos were deleted from the Vimeo Website on or after October 14, 2011, several months after the disclosure of Professor Horowitz's report. Attached hereto as group **Exhibit 7** are true and correct copies of pages which I accessed and caused to be printed from the Vimeo Website (or from archived copies thereof) on or about December 20, 2012, documenting this research and my findings.

¹ The information from Vimeo's "Purgatory" database described above was obtained by my following the steps referenced in Paragraphs 71 and 72 and Exhibits 67 and 68 to my original declaration. Where such information is described below, it also has been obtained in the same manner.

11. Attached hereto as **Exhibit 8** is a true and correct copy of the current profile page on the Vimeo Website, obtained on or about December 16, 2012, for a user named “S.I.R. Remixes” located at the URL <http://www.vimeo.com/sirremixes2>, which I accessed and caused to be printed on or about December 16, 2012.

12. Attached hereto as **Exhibit 9** is a true and correct copy of the current profile page on the Vimeo Website for a user named “David Deubel” located at the URL <http://vimeo.com/user1009844>, followed by a true and correct copy of a web page showing a video posted by this user at the URL <http://vimeo.com/3465147>, which I accessed and caused to be printed on or about December 19, 2012.

13. It is my understanding that the sixth account (ID number 158837) referenced in Paragraph 10 to the Supplemental Declaration of Michael Cheah pertains to a Vimeo user named Jeremy Chapman or “JChap,” who was referenced in my previous declaration and in Plaintiffs’ Statement of Undisputed Facts (¶ 388) as remaining active on the Vimeo Website despite three or more claims from Plaintiffs or other rights holders. Attached hereto as **Exhibit 10** are records from Vimeo’s Purgatory Database bearing this user ID number and reflecting entries for Mr. Chapman through 2010, which was before the third infringement claim referenced in Paragraph 66 of my prior declaration.

14. By investigation similar to that described above, I concluded that according to information provided by the Vimeo Website, the account of Mr. Chapman was terminated on or after November 15, 2012. Attached hereto as group **Exhibit 11** are true and correct copies of pages from the Vimeo Website and from archived copies thereof which I accessed and caused to be printed on or about December 20, 2012, documenting this conclusion.

15. Attached hereto as group **Exhibit 12** are true and correct copies of pages on the Vimeo Website corresponding to videos removed pursuant to Plaintiffs' Complaints and indicating the purported dates and times of removal of these videos, which I accessed and caused to be printed on or about December 20, 2012.

16. In Paragraph 4 to the Supplemental Declaration of Andrew Pile, Mr. Pile states that it is not possible for Vimeo to know whether Vimeo Staff buried certain videos individually or by burying the entire account of the user that posted the videos. In my experience, it is not difficult to determine this, because if a video is buried at the "account" level, this means that all other videos uploaded by the same user will be buried as well. For example, one video from Plaintiffs' Complaints that is noted as buried in the exhibits to my original declaration is the video bearing ID number 3984800, using the musical composition "A Milli." As reflected in Exhibit 36 to my original declaration, the user ID number for the account associated with this video is 941203. Attached hereto as **Exhibit 13** is a true and correct copy of a screenshot from the Vimeo Website taken in or about November 2009, showing the "A Milli" video referenced above as produced by Plaintiffs.

17. By examining the account of this user, I was able to identify additional videos that this user uploaded prior to the production of Vimeo's Purgatory database in 2010. Attached hereto as **Exhibit 14** are true and correct copies (accessed and printed by me on or about December 18, 2012) of web pages from the Vimeo Website showing videos uploaded by this same user on or about December 28, 2008 and February 6, 2009, respectively bearing the video IDs 2649924 and 3103379, each followed by a true and correct excerpt from the source code of these pages, showing the "user_ID" number (and hence the account) to be the same. (As can be seen, the account holder has changed his user name from "Street Tumblers" to "Tall Can Zach.")

I determined that neither of these two videos nor any other video associated with user ID 941203 is listed in Vimeo's produced data for "buried" videos referenced in Paragraphs 35 and 36 of my original declaration. My conclusion was thus that the video on Plaintiffs' schedules including "A Milli" was buried at the level of the individual video rather than by burying the entire account. I have successfully used the same type of analysis to determine whether other "buried" videos were buried individually or at the account level, including for videos referenced in Plaintiffs' Proposed Amended Schedules.

18. Attached hereto are as **Exhibit 15** is a true and correct screenshot from a web page on the Vimeo website appearing at the URL <http://vimeo.com/pro>, which was captured by me on or about December 18, 2012.

19. Attached hereto as **Exhibit 16** is a true and correct copy of a page from the Vimeo Website located at the URL <http://vimeo.com/5908057> and titled "DaveyDanceBlog -68- Verona," which I accessed and caused to be printed on or about May 7, 2012.

20. Attached hereto as **Exhibit 17** is a true and correct copy of an archived copy of the webpage available at <http://vimeo.com/julia> on or about July 2, 2007, located at the URL <http://web.archive.org/web/20070702084054/http://vimeo.com/julia>, which I accessed and caused to be printed on or about December 17, 2012.

21. Attached hereto as **Exhibit 18** is a true and correct copy of an archived copy of the webpage available at <http://vimeo.com/karenabad> on or about April 16, 2010, located at the URL <http://web.archive.org/web/20100416074246/http://www.vimeo.com/karenabad>, which I accessed and caused to be printed on or about December 17, 2012.

22. Attached hereto as **Exhibit 19** is a true and correct copy of the webpage available at the URL <http://vimeo.com/106867>, which I accessed and caused to be printed on or about December 19, 2012.

23. Attached hereto as **Exhibit 20** is a true and correct copy of a chart prepared by me listing works referenced as infringed in the schedules supplied with Plaintiffs' December 2009 Complaints that were also referenced in Plaintiffs' December 11, 2008 cease-and-desist letter, as shown at EMI 00004-009 in Exhibit 9 to the Declaration of Michael Cheah dated September 7, 2012.

24. Attached hereto as **Exhibit 21** is a true and correct copy of an IAC "Business Fact Sheet" that I retrieved and printed from an archived page of the website of www.iac.com on or about December 21, 2012, located at the URL <http://web.archive.org/web/20101226044018/http://www.iac.com/docs/BusinessFactSheet.pdf>. The document states in part: "In September 2001, Ask.com acquired Teoma Technologies, Inc., a search technology that has become the core of the Ask search engine."

25. Attached hereto as **Exhibit 22** is a true and correct copy of a web page that I retrieved and printed from the URL <http://sp.teoma.com/en/docs/about/index.shtml> on or about April 20, 2011. This document states in part: "Teoma.com is owned and operated by IAC Search & Media, Inc."

26. On or about April 20, 2011, I conducted research using the "Teoma" search engine available at the website www.teoma.com to determine if search queries using keyword metatags identified in the January 10, 2011 report of Plaintiffs' expert Ellis Horowitz (see ¶¶ 85-90) would return pages from the Vimeo Website as search results based on the presence of such metatags. (I understand that Professor Horowitz had concluded that Vimeo specifically

eliminated the default metatag "lip dub" in or about July 2010, but I reasoned that it was possible that certain "cached" pages using this metatag captured before this date would still be considered in queries to the Teoma search engine.)

27. Attached hereto as **Exhibit 23** is a true and correct copy of a web page printed by me on or about April 20, 2011, showing a portion of the results returned on the website www.teoma.com for the search query <<"lip dub" "video" "video sharing" "digital cameras" "videoblog" "vidblog" "video blogging" "home video" "home movie">>, where I specified that results be limited to the Vimeo website.

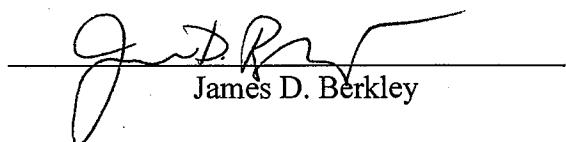
28. As can be seen in Exhibit 23, one of the web pages returned as a search result is a page at the URL <http://www.vimeo.com/apefos>. Attached hereto as **Exhibit 24** is a true and correct copy, printed by me on or about April 20, 2011, of this web page as found on the Vimeo Website.

29. Attached hereto as **Exhibit 25** is a true and correct archived copy of the aforementioned "apefos" web page on the Vimeo Website, retrieved and printed from the URL <http://replay.web.archive.org/20090123025058/http://vimeo.com/apefos>, on or about April 20, 2011, pertaining (as indicated by the URL) to the aforementioned web page on or about January 23, 2009.

30. Attached hereto as **Exhibit 26** is a true and correct excerpt from the source code of the archived Vimeo "apefos" web page referenced in Exhibit 25 above. As can be seen, this source code contains the keyword metatags referenced in my search query.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed at Los Angeles, California this 21 day of December, 2012.



James D. Berkley